IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: JR 1464/06

In the matter between:

PARROT PRODUCTS (PTY) LTD APPLICANT

AND

NUMSA OBO NXUMALO 1ST RESPONDENT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION 2ND RESPONDENT

ZWANE B, N.O. 3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The first respondent who is the applicant in this interlocutory application seeks an order to have the arbitration award issued by the third respondent (the commissioner) under case number GAJB6791-05 made an order of the court in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995 (LRA). In the main application the applicant, seeks an order reviewing and set aside the same arbitration award.

[2] The respondent Parrot Production (Pty) Ltd, in this matter is the applicant in the main review application. The applicant, NUMSA in this application is the respondent

in the main review applicant, acting on behalf of its member, Mr Nxumalo who in this judgement is for ease of reference referred to as the "employee."

[3] In the arbitration award issued by the commissioner during April 2006, the dismissal was found to have been unfair and the respondent ordered to reinstate the employee and pay compensation in the amount of R7 794.

[4] The respondent was dissatisfied with the outcome of the arbitration award and accordingly filed a review in terms of section 145 of the LRA on the 21st June 2006. The grounds for review in this matter are dealt with not for the purpose of evaluating the review application but the prospect of its success.

[5] The employee was prior to his dismissal employed by the respondent as a store man. The respondent proffered charges against the employee arising from an incident which occurred on 1 February 2005. On that day the employee had an altercation with one of the employees of the respondent Ms Marion Schultz. The altercation arose apparently at a disciplinary hearing where the employee was representing another employee, Mr Veli Nhlapo. Because of that altercation the employee was issued with a notice of a disciplinary inquiry which reads as follows:

> *"A formal disciplinary charge has been laid against you*
>
> *Name: Thami Nxumalo*
>
> *The charge is as follows:*
>
> ***INSUBORDINATION / FAILURE TO FOLLOW AN INSTRUCTION***

FROM A MANAGER

On 1st February 2005 you and Thembi Nhlapo came into the office of the Financial Manager Marion Schulz to represent Veli Nhlapo, you were advised that only one person could represent him and the other would need to leave. You argued with her and neither one would leave her office. In general it is found unacceptable to argue with a manager and not to follow an instruction given by a manager."

[6] The chairperson of the disciplinary hearing found the employee guilty as charged and reasoned as follows:

"You of your own accord instructed a fellow employee to leave her work place without permission.

You specifically disobeyed an instruction from a senior member of management to come to her office alone.

You showed extreme disrespect to senior member of management by questioning her authority to tell Thembi to return to work.

You were disruptive in that you proceeded to question a senior member of management in a manner that was completely out of order

You interfered with a direct management instruction given to Thembi, when Marion told her to return to work.

You already have a final written warning for a previous charge of insubordination.

I feel that your behaviour is obstructive, and your disrespect and negative attitude towards a senior manager, Marion, is totally unacceptable and

will not be tolerated. You are therefore dismissed with immediate effect."

[7] The employee being unhappy with the outcome of the disciplinary hearing referred the matter to the CCMA for conciliation and thereafter it having failed, referred the matter to arbitration.

The grounds for review

[8] The respondent in its application to review the commissioner's award contends that the commissioner committed a gross irregularity in that he made a material finding which cannot be substantiated by the evidence presented before him. It is further contended that the award is not rational or justifiable in relation to the reason given for it. The commissioner's award is criticised more particularly because the commissioner:

"17.1 . . . formulated the issue in dispute too narrowly as simply whether or not Nxumalo was insubordinate in arauiric (fic), with me. In doing so, he disregarded the evidence presented of Nxumalo's disrespectful and defiant behaviour towards me as a senior manager. Which evidence it is submitted constitutes good grounds upon which to make a finding that Nxumalo was guilty of serious misconduct and that there was thus a valid and fair reason for his dismissal. As was found in essence by the chairperson of Nxumalo's disciplinary enquiry.

17.2 . . . misconceived and misapplied the law concerning the rights of, and the consequent protection afforded to, an employee acting as a fellow employee's representative in a disciplinary enquiry. The applicable labour jurisprudence does not, as effectively the third respondent found, give an employee licence to

act in a grossly disrespectful or defiant manner towards management merely because he or she is acting, or purports to act, in the capacity of a representative at a disciplinary enquiry."

The arbitration award

[9] In arriving at the conclusion that the dismissal was unfair the commissioner reasoned that there was no valid and fair reason for the dismissal of the employee and that accordingly the respondent had failed to discharge its onus of showing that the dismissal was substantively fair. It was for this reason that the commissioner ordered the respondent to reinstate the employee on the same terms and conditions not less favourable to those prevailing at the time of his dismissal.

In analyzing the evidence and the arguments which were presented during the proceedings the commissioner observed as follows:

> *"The question is whether or not the applicant [Nxumalo] was insubordinate in arguing with the chairperson [Schulz] as the representative at the disciplinary hearing. Even if the applicant at that stage was not an elected shop steward which he was. It is my view that he was arguing in the capacity of a representative at the disciplinary hearing. It is trite law that in our labour jurisprudence that a representative in any labour forum has the same status as that of the opponents (managers). In the circumstances, the argument of the applicant was appropriate even if he was not correct in what he was saying, therefore it cannot amount to insubordination."*

The application to dismiss and make the award an order

[10] The reasons for seeking the dismissal of the review application and making the award an order of court are set out in the employee's application as follows:

> "4.1 Since the arbitration award was issued on or around the 24th April 2006, the first Respondent failed and/ or refused to comply with the said award.
>
> 4.2 Despite the fact that the 1st *Respondent has on many occasion, they still maintain that there has been tape recording and a Bundle A has not been delivered*.
>
> *4.3 The Applicant employee is seriously prejudiced by this delaying tactics from the employer as he is currently unemployed and suffering financial hardships."*

Evaluation

[11] It seems to me convenient to deal with the application to make the arbitration award an order of court as the outcome thereof will determine whether or not there is a need to consider the grounds for dismissal of the review application.

[12] It is trite that a review application does not automatically stay the enforcement of an arbitration award. In this respect Grogan AJ in *Professional Security Enforcement v Namusi (1999) 20 ILJ 1279 (LC); [1999] 6 BLLR 610 (LC) at para 10,* had this to say*:*

> *"Neither the Act not (sic)] the common law lays down a hard-and-fast rule that an application to have an award (or any judicial order) made an order of court must be dismissed or conditionally postponed if the person against whom it is to be made has applied for its rescission or review. This court has, however, adopted the practice of postponing applications*

brought under s 158(1) (c) if the respondent has filed an application for review."

[13] The legal consequences of making an arbitration an order of court is that it changes the status of such an award to a court order which means any pending review would fall away unless the court directs otherwise. See *Potch Speed Den v Rajah [1999] JOL 4979 (LC).* In other words there can be no review against an award that has been made an order of court. The remedies available to a party wishing to challenge an award that has been made an order of court is either to apply to have the order rescinded or apply for leave to appeal and if successful appeal against such an order. It should be noted that the court could in addition to making an award an order also suspend it pending the outcome of the review application in terms of section 158(1) (g) of the LRA.

[14] In considering whether or not to make an arbitration award an order of court, the court exercise a judicial discretion which it does by taking into account the balance of convenience, the requirements of fairness to both parties, the goal to bring the dispute to finality, the prospect of success in the review application, the policy of the LRA and the interest of administration of justice. In order to succeed in opposition to an application to make award an order of court the party opposing the application has show prospects of success in the review application. See *Ntshangane v Speciality Metals CC [1998] 3 BLLR 302 (LC)* and *NEHAWU obo Vermeulen v Director General: Department of Labour [2005] 8 BLLR 840 (C).*

[15] In the present instance the respondent has not made a proper case on the papers

that it has reasonable prospects of success. In its answering affidavit it focuses its energy in explaining the delay in prosecuting the review application. It contends in this respect that the delay was occasioned by the CCMA in making the record of the arbitration proceedings available to the Registrar.

[16] In its heads of argument in the review application the respondent contends that the material issue is whether the commissioner committed an error of law in his finding that the employee's conduct did not amount to insubordination because he was acting in his capacity as a representative of the other employee who was at that time facing a disciplinary hearing. In this respect the respondent relies on the cases of, *Irvin & Johnson Ltd v CCMA & others [2006] 7 BLLR 613 (LAC)* and *Maneche & others v CCMA and others [2007] JOL 20281 –*

In *Irvin & Johnson* at para [48] the court in dealing with the issue a commissioner committing an error in law had the following to say:

> "[48] the fact that the commissioner committed an error of law is not on its own sufficient to justify that her award be reviewed and set aside. A commissioner is entitled to be wrong in law in certain circumstances without his or her award having to be reviewed and set aside for that reason. However, in certain circumstances an error of law may be such that the award or decision must be reviewed and set aside. One of those is where the Legislature did not intend that the tribunal concerned should have exclusive authority to decide the question of law concerned and the error is a material one (Hira & another v Booysen & another 1992 (4) SA 69 (AD) at 93C–H)."

[17] In *Maneche,* Van Niekerk AJ as he then was, in dealing with the same issue had the following to say:

> "[13] It is now well established in this Court that arbitration proceedings conducted under the auspices of the CCMA may be reviewed on the grounds that the commissioner committed a material error of law (see Hira & another v Booysen & another 1992 (4) SA 69 (A) at 93, Mlaba v Masonite (Africa) Ltd & others [1998] 3 BLLR 291 (LC) [also reported at [1998] *JOL 2063 (LC)–Ed] at 301C–302E, National Commissioner of SA Police Service v Potterill NO & others (2003) 24 ILJ 1984 (LC) at paragraph [25], OK Bazaars (a division of Shoprite Checkers) v Commission for Conciliation, Mediation & Arbitration & others (2000) 21 ILJ 1188 (LC) at paragraph [10], and Foschini Group (Pty) Ltd v CCMA & others (2002) 23 ILJ 1048 (LC) [also reported at [2002] JOL 9728 (LC)–Ed] at paragraph [25]).*
>
> *[14] The reviewability of an arbitration award on the basis of an error of law on the requirements set out in Hira v Booysen was recently approved by the Labour Appeal Court. In Mlaba's case, this Court held that the review of CCMA awards on the basis of an error of law is essentially one of materiality (at 301). The test of materiality may be described as follows:*
>
> *'If, in the exercise of this discretion, a Commissioner makes an error of law, this does not render the decision of the Commissioner reviewable unless it is a material error in the*

sense that it results in the Commissioner asking the wrong question or basing his or her decision on a matter not prescribed by the statute (see Moolman Brothers v Gaylard NO & others (1998) 19 ILJ 150 (LC) at 150 at 156).'

[15] The Labour Appeal Court has emphasized the importance of the requirement that a commissioner "ask the right question". In Stocks Civil Engineering (Pty) Ltd v Rip NO & another (2002) 23 ILJ 358 (LAC) [also reported at [2002] *JOL 9318 (LAC)–Ed] Van Dijkhorst AJA said:*

'If the decision cannot be arrived at should the correct criterion be applied, it may justifiably be concluded (in the context of an error of law) that the tribunal 'asked itself the wrong question' or 'applied the wrong test' or 'based its decision on some matter not prescribed for its decision' or 'failed to apply its mind to the relevant issues in accordance with the behest of the statute'. Such decision is reviewable.' "

[18] It is clear that the above authorities do not support the proposition of the respondent because it is not every error in law that would vitiate the arbitration award of a commissioner to an extent justifying interference by the Court. It is only when the commissioner commits an error of law which is so material that it denies the other party a fair hearing that the court would be entitled to interfere with the award. In other words an error in law would vitiates the award if it has been shown that the commissioner has failed to apply his or her mind to the relevant issues before him or

her.

[19] The other basis upon which the respondent relies on in contending that the commissioner committed an error of law in arriving at the conclusion that the decision of the commissioner is reviewable is the dictum in the case of *Mondi Paper Co Ltd v Paper Printing Wood & Allied Workers Union & Another (1994) 15 ILJ 778 I(LAC).*

[20] In *Mondi Paper supra* the matter initially came before the then Industrial Court in terms of section 46(9) of the Labour Relations Act 28 of 1956. The shop steward who at the time of the disciplinary hearing had been in the employment of Mondi Paper was dismissed after interrupting a meeting which was convened by a manager to discuss a written warnings which had been given to employees in their absence because they were refusing to attend disciplinary hearings where they would have been charged with participating in a national stay away. Soon after the commencement of the meeting the shop steward arrived and contended that the meeting was irregular and unauthorized.

[21] The shop steward effectively disrupted the meeting and took with him the employee who had been summoned to the meeting, in defiance of an express request by the manager who had called the meeting that the employee should remain. The Labour Appeal Court agreed with the Industrial Court that the conduct of the shop steward in interrupting the meeting was unjustified. In dealing with the merits of the matter the Labour Appeal Court held that:

> *"No doubt a shop steward should fearlessly pursue the interests of the members he represents, and he ought to be protected against being victimized for doing so. However this is no licence to resort to defiance*

and needless confrontation. I do not agree with the view of the court a quo that the fact that he is acting in his capacity as a shop steward serves to 'mitigate' conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct appropriate to that relationship.

I agree with the finding of the court a quo that the second respondent's defiance of management's authority amounted to insubordination. It is clear too that his conduct was deliberate, and in my view warranted disciplinary steps being taken against him.

The appellant's counsel conceded, correctly in my view, that the incident did not in itself warrant the ultimate sanction of dismissal. He submitted though that the second respondent's lack of remorse and persistence in I maintaining that he had done nothing wrong, weighed against the second respondent, and that on those grounds the dismissal was justified. He referred us in this regard to principles developed by the criminal courts in relation to the assessment of sentence."

[22] The Court went further to say:

"An employer's response to a breach of duty by an employee ought properly to be dictated by the extent to which the breach has impaired the employment relationship, and nothing more. The fact that an employee remains defiant is relevant only in that context.

In my view the proper enquiry in each case is whether the employer can

fairly be expected to continue the employment relationship. The attitude adopted by the employee is but one of the factors which is relevant to that enquiry. The second respondent had been a shop steward for about two years. The evidence does not suggest that he has a history of carrying out his duties in a confrontational and defiant manner. Although he has received warnings previously, they do not appear to have related to his conduct as a shop steward. Furthermore, in the absence of evidence relating to the circumstances which gave rise to those warnings, it is not possible to infer there from that the employment relationship cannot fairly be expected to continue. I agree in those circumstances with the view of the court a quo that the sanction of dismissal for the infraction in question was excessive. I have already indicated, however, that in my view the second respondent's conduct warranted disciplinary action being taken against him, though falling short of dismissal. Section 46 (9)of the Act contemplates that a court will grant such relief as may be appropriate to finally determine the dispute before it. An order of reinstatement, without more, does not achieve that purpose, suggesting as it does that no disciplinary action against the second respondent is warranted. In my view the determination should be amended to make it clear that disciplinary action was not warranted."

[23] It is common cause in the present matter that Nxumalo arrived at the disciplinary hearing to represent another employee with a certain Thembi. There was an exchange of words as concerning the role and the need for two representatives at that hearing.

The chairperson of the hearing insisted that Thembi should go back to her workstation as the policy allowed for only one representative at a disciplinary hearing.

The commissioner in his award formulated the issue he had to answer to be:

> *"Whether or not the applicant was insubordinate in arguing with the chairperson at the disciplinary hearing."*

[24] The commissioner found that Nxumalo in arguing with the chairperson of the disciplinary hearing did so in his capacity as the representative of the employee who was facing a disciplinary hearing and that whatever he may have said could not amount to insubordination. The commissioner in arriving at the conclusion that the dismissal was unfair seems to have been influenced by the circumstances within which the exchange between the parties took place. In this respect the commissioner took into account that the argument between the parties concerned, whether there was a policy which governed the number of representatives who could assist an employee at the disciplinary hearing. Although the respondent argued that such a policy was in existence none was produced.

[25] What the respondent ought to have done in order to succeed in its opposition to the applicant's application to have the award made an order of the Court was to make averments and substantiate it in its opposing papers showing that there is a chance that the award could in the review application be found that the award does not meet the standard of reasonable award as set out in the case of *Sidumo and Another v Rustenburg Platinum Mines and others [2007] 12 BLLR 1097 (CC).* It seems to me, reading from the other award and considering the grounds of review, the prospects of

faulting the commissioner for unreasonable or any of the grounds listed under Section 145 of the LRA, is remote. The commissioner in arriving at the conclusion as he did, considered and applied his mind to the facts and the circumstances of the case.

[26] In the light of the above, I am of the view that the respondent has failed to show a reasonable probability in succeeding in its review application and for this reason it would not be fair to delay the finalisation of this matter any more. In fact as indicated earlier the respondent did not in its opposing papers make out a case showing that it has prospects of succeeding in its review application and for this reason alone the applicant stand to succeed in its application to have the award made an order of Court.

[27] In the premises the following order is made:

1. The arbitration award issued by the third respondent under case number GAJB 6791-05 and dated 24th April 2006 is made an order of the Court.
2. There is no order as to costs

Molahlehi J

Date of Hearing : 16th September 2009
Date of Judgment : 22nd January 2010

Appearances

For the Applicant : Adv J Campanella

Instructed by : Matjila Hertzberg and Dewey Attorneys Cliffe Dekker

	Hofmeyr Inc
For the Respondent:	Mr J Motau (union official)
Respondent:	Mr J Motau (union official)